# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statement | 3 |
| Argument | 6 |
| Conclusion | 9 |


## CITATIONS

Cases:


| | |
|---|---|
| *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 | 8 |
| *Hanly* v. *Kleindeinst*, 471 F.2d 823, certiorari denied, 412 U.S. 908 | 8 |
| *Hiram Clarke Civic Club, Inc.* v. *Lynn*, 476 F.2d 421 | 7, 8 |
| *National Labor Relations Board* v. *Bell Aerospace Co.*, No. 72-1598, decided April 23, 1974 | 6 |
| *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759 | 6, 7 |
| *Save Our Ten Acres* v. *Kreger*, 472 F.2d 463 | 7, 8 |
| *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 | 6 |
| *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244 | 8 |

Statutes and regulations: Page

National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321, *et seq.*

42 U.S.C. 4332 ..... 5

42 U.S.C. 2131 ..... 3
42 U.S.C. 2235 ..... 3
10 C.F.R. Part 20 ..... 5, 7
10 C.F.R. 50.34(b) ..... 4
10 C.F.R. 50.40 ..... 3, 4
10 C.F.R. 50.57(a) ..... 3
10 C.F.R. Part 100 ..... 4

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-1315

MORNINGSIDE RENEWAL COUNCIL, INC., ET AL., PETITIONERS

*v.*

UNITED STATES ATOMIC ENERGY COMMISSION, UNITED STATES OF AMERICA, AND TRUSTEES OF COLUMBIA UNIVERSITY

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 482 F.2d 234. The final agency decision and the memorandum opinion denying reconsideration are reproduced at Pet. App. 102a-148a

and Pet. App. 149a-155a, respectively. The agency's initial decision is reproduced at Pet. App. 21a-101a.

## JURISDICTION

The judgment of the court of appeals was entered on July 5, 1973. A timely petition for rehearing and for rehearing *en banc* was denied on October 4, 1973 (Pet. App. 18a-20a). The petition for certiorari has been treated as filed on December 29, 1973.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 2350 and 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Atomic Energy Commission's issuance of an operating license for a research reactor was invalid because the Commission determined certain questions in an adjudicatory, rather than a rule-making proceeding.

2. Whether the court of appeals applied the proper standard in reviewing the Commission's determination that the issuance of the license was not an action requiring the filing of an environmental impact statement.

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[1] The petition was originally filed in typewritten form on December 29, 1973. On January 22, 1974, the Court denied petitioners' motion for leave to proceed in forma pauperis, and returned the petition. When printed copies of the petition were received on January 27, 1974, the time of docketing was backdated to the date of the original filing.

## STATEMENT

The reactor at issue in this case has been built, pursuant to an AEC construction permit,[2] in the basement of a building on the Columbia University campus in New York City (Pet. App. 25a-26a, 46a). It is a small Triga reactor,[3] which will be used for research and to train engineering students (Pet. App. 2a).[4]

Research reactors are governed by numerous AEC regulatory standards. Once a reactor has been constructed in accordance with a construction permit, an AEC license to operate it is required (42 U.S.C. 2131, 2235). No such license is issued unless the AEC regulatory staff concludes, after a comprehensive safety evaluation, that the reactor will be operated safely (42 U.S.C. 2235; 10 C.F.R. 50.40, 50.57 (a)). This evaluation includes an analysis of reactor operations under normal conditions and under hypothetical accident conditions. The application for a research reactor operating license is required to propose a postulated accident which would result in a hazard as great or greater than the potential hazard

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[2] The construction permit was issued after uncontested proceedings in which petitioners could have participated, but did not.

[3] It is designed to operate at power levels up to 250 kilowatts (Pet. App. 47a). In contrast, commercial power reactors frequently are designed to operate at power levels exceeding three million kilowatts.

[4] It can in addition produce isotopes for medical uses (Pet. App. 2a).

from any accident considered credible ("the design basis accident" or "maximum credible accident") (Pet. App. 57a, 108a). The AEC regulatory staff may accept the applicant's design basis accident, or hypothesize a more serious one. In any event, the staff will not recommend the issuance of an operating license unless it is satisfied that the reactor will be operated so that, even if the hypothetical design basis accident were to occur, the public health and safety would not be endangered (10 C.F.R. 50.34(b)(4), 50.40).

When Columbia applied for a license to operate its reactor, petitioners intervened in the proceeding as representatives of certain area residents opposing the issuance of the license. Hearings were then held before an AEC Licensing Board which "decline[d] to decide the issue of whether the issuance of the proposed license would be inimical to the health and safety of the public" (Pet. App. 73a).[5] It based this refusal on the fact that the Commission has not defined, by regulation, the maximum permissible public exposure to radiation from a design basis accident involving research reactors (Pet. App. 55a, 63a, 73a).[6]

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[5] The Licensing Board rejected petitioners' proposed design basis accident as not credible, and approved the one used by the regulatory staff, which was more severe than that proposed by the applicant (Pet. App. 57a-60a).

[6] In contrast, a Commission regulation does define the maximum permissible public exposure to radiation resulting from accidents involving other larger reactors (10 C.F.R. Part 100). This regulation identifies the limitations in terms of

The Commission's Appeal Board, which has been delegated final decisional authority by the Commission, reviewed the entire evidentiary record.[7] It concluded that the issuance of the license would not be inimical to the public health and safety.[8] It also determined that the issuance of the license would have no significant environmental impact, and therefore that no environmental impact statement was required by the National Environmental Policy Act of 1969 83 Stat. 852, 42 U.S.C. 4321, *et seq.* ("NEPA", 42 U.S.C. 4332). Pet. App. 134a-144a.

The court of appeals affirmed the decision of the appeal board. It noted that the board "carefully considered all aspects of the issues involved in the granting of an operating license for this particular reactor," and that there was substantial evidence in the record supporting its conclusions (Pet. App. 8a).

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dosages, length of exposure, population affected and distances from the reactor site.

[7] It ordered additional hearings to clarify the record in certain respects; the staff submitted additional experimental data and explanations which resolved possible inconsistencies in the fission product release data (Pet. App. 6a-7a, 110a). The intervenors presented testimony of Dr. Sternglass concerning infant mortality rates near certain Triga reactors, which the Board analyzed and rejected as "not scientifically credible" (Pet. App. 117a-130a).

[8] This conclusion was based in part upon a determination that the design basis accident would not result in any fission product release in excess of those permitted by AEC safety regulations for normal reactor operations (10 C.F.R. Part 20). Pet. App. 113a-114a. The Appeal Board accepted the regulatory staff's design basis accident, with one minor modification (Pet. App. 109a).

The decision that no environmental impact statement was necessary was based on a finding which "was supported by substantial evidence in the record and the Board's decision was clearly not arbitrary and capricious" (Pet. App. 8a). The court of appeals further held that the decision to proceed by adjudicatory, rather than rule-making, proceedings was a proper exercise of the agency's discretion (Pet. App. 9a).

## ARGUMENT

1. The court of appeals correctly held that the absence of regulations regarding a postulated accident for a research reactor was no bar to licensing where, as here, the adjudicatory decision was "amply supported by a full record" (Pet. App. 9a).

This Court has recently reaffirmed that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily within the informed discretion of the administrative agency" (*Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203 (*Chenery II*), quoted with approval in *National Labor Relations Board* v. *Bell Aerospace Co.*, No. 72-1598, decided April 23, 1974, slip op. 26).[9]

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[9] *Bell Aerospace, supra*, slip op. at 24-27, also indicates that *Chenery II* and *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, support the decision below, rather than being inconsistent therewith as claimed by petitioners (Pet. 17-19). The board here properly performed the agency's "statutory duty to decide the issue at hand in light of the proper standards." *Bell Aerospace, supra*, slip. op. at 25. There was no effort to formulate a general rule

In any event, the appeal board found (n.8, *supra*) that any radiation releases from this reactor which could credibly be postulated, even under accident conditions, would be less than those permitted by existing AEC safety regulations governing normal (non-accident) operations of all reactors, including research reactors (10 C.F.R. Part 20). The radiation releases permitted by an accident regulation would presumably exceed, and surely be no less than, the releases permitted for normal operations by Part 20. Thus there was no need in this case to consider whether agency regulations defining the maximum permissible releases from research reactors under accident conditions would be necessary before a license could be issued for the operation of a reactor which, unlike this one, might have releases in excess of Part 20 limits.

2. Petitioners claim that there is a conflict among the circuits concerning the proper scope of judicial review of an agency determination that no environmental impact statement need be prepared. They argue that the "standard of reasonableness" adopted in such cases as *Save Our Ten Acres* v. *Kreger*, 472 F.2d 463, 466 (C.A. 5), and *Hiram Clarke Civic Club, Inc.* v. *Lynn*, 476 F.2d 421 (C.A. 5), is more stringent than the "arbitrary and capricious" stand-

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without prescribed rulemaking procedures—the practice condemned in *Wyman-Gordon*, *supra*, 394 U.S. at 763-765. Indeed, the Appeal Board strongly recommended future rulemaking, although it found it possible to proceed without such rulemaking on the specific facts of this case.

ard of *Hanly* v. *Kleindienst*, 471 F.2d 823, 829 (C.A. 2), certiorari denied, 412 U.S. 908.[10] But this is not an appropriate case for this Court to consider whether these different formulations of the standard for judicial review may lead to different results in cases, such as those cited above, in which the courts are asked to review agency determinations made without an adjudicatory hearing.

This case does not involve the standard for review in such cases since here, as the court of appeals noted, "there was a reviewable environmental record made with the participation of the public so that the finding that no NEPA statement was necessary was made by the Board with full knowledge of all the environmental questions raised by the petitioners. Here the underlying issue was 'safety' and the inquiry into that area was detailed and entirely adequate" (Pet. App. 9a).

As this Court explained in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 413-414, any

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[10] We believe that the Fifth Circuit would have reached the same result as the court below on the facts in this record. Both *Save Our 10 Acres* and *Hiram Clarke* emphasize that the issue for the court to determine is whether the agency fully considered all the environmental factors urged by the plaintiffs, and reasonably concluded that the proposed action would have no significant environmental effects. *Save Our 10 Acres* v. *Kreger, supra*, 472 F.2d at 466-467; *Hiram Clarke Civic Club, Inc.* v. *Lynn, supra*, 476 F.2d at 426. Cf. *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244 (C.A. 10). This is, in effect, the standard utilized by the court below, which emphasized that the agency's inquiry was "detailed and entirely adequate" (Pet. App. 9a).

reviewable agency action is to be set aside if arbitrary and capricious, and agency action "based on a public adjudicatory hearing" must also be set aside if it is not supported by substantial evidence. The court below applied these tests, and concluded that the agency decision that the licensing of this reactor was not a major federal action significantly affecting the quality of the human environment "was supported by substantial evidence in the record and * * * was clearly not arbitrary and capricious." Pet. App. 8a. There is therefore no need for further judicial review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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